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Before the
COPYRIGHT ROYALTY JUDGES
Washington, DC

In the Matter of	)	
Notice of Inquiry Regarding Categorization of Claims for Cable or Satellite Royalty Funds and Treatment Of Ineligible Claims	)	**Docket No. 19-CRB-0014-RM**

COMMENTS OF SETTLING DEVOTIONAL CLAIMANTS

On behalf of the Settling Devotional Claimants ("SDC"), we hereby submit these comments in response to the Notice of Inquiry announced by the Copyright Royalty Judges ("Judges") in the Federal Register. *See* 84 Fed. Reg. 71852 (December 30, 2019) (the "Notice").

I. INTRODUCTION

In the Notice, the Judges inquire into two topics that were addressed and resolved early in the history of the compulsory licensing system; namely, (1) the identification of Allocation Phase (formerly Phase I) categories, and (2) the identification and treatment of invalid claims. The SDC support maintaining the long-standing identification of claimant categories and the handling of invalid claims for two reasons.

First, the current structure of the claimant categories, which has been in place for decades, has facilitated the distribution of billions of dollars of compulsory royalties by the Judges and their predecessors, and has enabled claimant representatives to settle many proceedings without resort to expensive, time-consuming litigation. To modify the system at this

date could disrupt the management of the compulsory system and undermine Congress' goal of enabling copyright owners to receive the benefits of the compulsory system efficiently.

Second, to introduce questions regarding unclaimed or invalidly claimed programming into the Allocation Phase would materially expand the factual evidence needed by parties to address the identification of claimed programming in each representative category and would create additional evidentiary burdens for all parties in these proceedings. Questions regarding the ownership of many of the thousands of programs retransmitted each year and the copyright status of libraries of copyrighted works (as opposed to the validity of claims as filed) are best handled in the Distribution Phase, as needed, not the Allocation Phase. If the issue of invalid claims were shifted to the Allocation Phase, the burden and costs of participating in contested proceedings would increase significantly, and would especially impact smaller claimant categories, like Devotional Claimants. In such event, the SDC might be obligated to address the status of retransmitted programs (as opposed to claims) in all categories, and particularly program titles in the Program Supplier, Public TV, Commercial TV, and Canadian Claimant Categories. That effort would turn an already complex proceeding, focused on claimants and competing methodologies, into a potentially unmanageable morass, essentially diverting more claimant funds into the hands of attorneys and expert consultants instead of to the claimants where they belong. Simply stated, the SDC believe the long-accepted policy that allocates shares to claimant groups, without regard to unclaimed titles or the validity of claims filed by specific program owners, should remain unchanged.

II. The Allocation Phase Categories Should Not be Changed

The category definition issue posed by the Notice is whether it would make more sense to use a program-centric definition, rather than a claimant-centric definition. As a preliminary point, the SDC wish to underscore that the Devotional Claimants category largely satisfies the program-centric criterion. The claimants in the Devotional category are comprised exclusively of copyright owners that produce and syndicate religious-themed programs. As surveys introduced by Joint Sports Claimants (the Bortz Survey) and MPA-represented Program Suppliers (the Horowitz Survey) demonstrate, cable operators are familiar with religious programming and can articulate the relative value of its content in a consistent, reliable, and predictable way. While some religious programs are produced by local television stations and fit within the Commercial Television category definition, the SDC and CTV have been able to address their issues without needing to present any controversy to the Judges. Similarly, a few religious programs appear within the Canadian Claimant Group. However, these are exceptions to the general rule, that the Devotional Claimant category is not only a claimant group, but also a program-defined category. Even with these qualifications noted, the SDC support maintaining the current Allocation Phase categories.

This structure has simplified the process of assembling of evidence during contested proceedings, and has also been a principal reason why parties have been able to reach full settlement of Allocation Phase controversies in connection cable royalties for many years – and for every year in connection with satellite royalties. Even for years in which controversies have been litigated, the claimant categories have been able to reach understandings regarding partial distributions of funds. The ability to reach such interim settlements promote equitable distributions while proceedings regarding methodologies proceed. Any change in the definition

of parties/categories would necessarily disrupt the order established by years of negotiated resolutions.

To unsettle these expectations retrospectively, such as in the context of the suspended 2014-2017 Cable and Satellite Royalty Proceedings, would especially be a mistake. Even though the presentation of evidence has been delayed, the gathering of evidence has been underway for years. Surveys of cable operators, who are asked to assess the relative value of claimant categories in their decisions to retransmit signals, concluded years ago. It is the SDC's long-stated position that these surveys are the best evidence and appropriate starting point for allocation of shares. A change in category definitions at this stage could impact the reliability of survey evidence in unpredictable ways. At the very least, survey experts would have to interpret survey results in light of changed definitions, which would present new evidentiary challenges, increasing costs and engendering delays.

Furthermore, the SDC submit that if any change in category definitions is implemented, it should not be applied *ex post facto* to cable and satellite royalty years that have already passed. The parties should be afforded time to make adjustments in the collection and evaluation of relevant data, such as annual surveys of cable operators. Some realignment of claimant groups may even be required, which will impose significant difficulties for claimant groups like the SDC that have existing agreements predicated on the longstanding category definitions. In SDC's view, no change in category definitions should be implemented retrospectively to the calendar year for which royalties are collected. At this point, 2021 or 2022 should be the earliest effective date for any rule change.

As to the suggestion that categories should be program-centric, as stated above, the Devotional Claimants category is already a prototype for that standard. All nationally syndicated

religious programs are embraced within the definition. The SDC are not a preexisting lobbying or corporate entity. Rather, they are a group of religious ministries that produce television program and that collectively manage the litigation of their claims in the compulsory royalty proceedings. The SDC have no prior organized status, nor do they participate as a collective entity in any other context. As a result, if the Judges wish to rely on program orientation for allocation of shares, the Devotional Claimants category substantially fits that model, and no change to the Devotional Claimants category definition is required.

III. The Handling of Unclaimed Programs and Invalid Claims Should Not Change

As the parties' stipulation regarding category definitions has served to increase the efficiency of the royalty distribution proceedings for decades, so too has the CRT's decision to consider all programs as claimed in Phase I or the Allocation Phase, when determining claimant categories' relative shares. Removing the need to address invalid claims, unclaimed programs or claims related to specific program titles in the Allocation Phase simplifies the administrative proceeding substantially. The SDC strongly support maintaining this structure going forward.

As the Judges are aware, each individual claim usually represents many specific television program titles. With more than 500 individual cable claims filed each year in 2014-2017, the number of program titles retransmitted in this proceeding will number in the thousands, if not tens of thousands. If Allocation Phase Parties were to identify program titles that are affiliated or unaffiliated with these hundreds of annual claims to evaluate the validity of non-claimed programs, it would be an enormous task, reserved for only the most well-healed of copyright claimants.

For example, evaluating whether older programs have fallen out of copyright protection due to failure to comply with the formalities of prior copyright law, or tracing claims to

corporate copyright owners who no longer exist, or individual owners who have died, would be a challenging and labor-intensive task. Public domain programs, like the perennial Christmas classic, *It's a Wonderful Life*, and similarly situated movies and TV series produced in the 1930s-1960s for which copyright formalities were not properly observed, are routinely broadcast by public and commercial TV stations retransmitted via the compulsory license. Yet, as public domain works, these titles have no relative value if claimed. Inchoate claims for particular programs that were not pursued because no current owner exists, the owner missed the filing deadline, or filed an invalid claim, should not preoccupy the resources of the Judges or the parties in the Allocation Phase. Especially for smaller claimants, like the SDC, pursuing such facts makes little economic sense. Even larger claimant groups could be hard-pressed to justify the resources necessary to unearth all the relevant information about these works.

As a result, the decision, originally announced the CRT in one of its earliest actions, not to attempt to divine the legal status and relative value of every potential claimant and program, was wise. Indeed, the Congress recognized this fact when, in adopting the current statutory scheme, it instructed the Copyright Royalty Judges "to act in accordance with … prior determinations and interpretations of the Copyright Royalty Tribunal." 17 USC Section 803(a). In H. Rep. No. 108-408 (108th Cong. 2d Sess.), accompanying the Copyright Royalty and Distribution Reform Act of 2003, Congress noted that the CRT rulings "are not necessarily controlling, but will be considered for their precedential value and may be distinguished." However, since the CRT wisely organized management of the compulsory licensing regime, the SDC do not believe this ruling should be changed.

Finally, the Judges ask commentators to address the treatment of unclaimed funds and whether re-apportionment based on claimant categories, rather than program categories, makes

better sense. Because the Devotional Claimants are both a claimant-centric category and a program-centric category, the answer to this question is clear: the relative value of any unclaimed religious programs should remain within this category's share and not re-apportioned to any other category. All religious program interests are naturally allied with the devotional category, and any useful methodology designed to reflect the relative value of religious content properly measures them only within the Devotional Claimants category.

Respectfully submitted,

SETTLING DEVOTIONAL CLAIMANTS

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Certificate of Service

I certify that on March 16, 2020, I caused a copy of the foregoing to be served on all parties who have entered an appearance by filing through eCRB.

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